STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF WEST BLOOMFIELD, Plaintiff/Counter-Defendant-Appellee,	UNPUBLISHED February 1, 2007
V DUANE MONTGOMERY, JR., Defendant/Counter-Plaintiff-Appellant.	No. 264500 Oakland Circuit Court LC No. 03-053751-CE

Before: Donofrio, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant/counter-plaintiff, Duane Montgomery, Jr., appeals as of right from an order dismissing defendant's counterclaim against plaintiff/counter-defendant, Charter Township of West Bloomfield. He also challenges the circuit court's earlier order awarding plaintiff attorney fees and costs incurred in abating a nuisance on his property. Because defendant was not denied his right to a trial by jury; and because the circuit court did not err when it: awarded plaintiff more than $13,000 as costs incurred in abating the nuisance on defendant's property, ruled that plaintiff's action was not barred by "res judicata and doctrines of estoppel," and dismissed defendant's counterclaim, we affirm.

Defendant first argues that he was denied his constitutional right to a trial by jury under the Michigan Constitution. MCR 2.603(B)(3)(b) provides for a jury trial regarding the amount of damages "to the extent required by the constitution." Const 1963, art 1, § 14, provides that "the right to jury trial shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law." MCR 2.508(B)(1) requires that a demand for jury be made "within 28 days after the filing of the answer or a timely reply." Here, neither plaintiff nor defendant requested a jury trial on the primary complaint.[1] Defendant's right to a jury was therefore waived as matter of law. Const 1963, art 1, § 14.

[1] Defendant did not make a jury demand on the primary complaint in accordance with MCR (continued…)

Defendant next argues that the circuit court erred in awarding plaintiff more than $13,000 in costs and fees incurred in abating the nuisance on defendant's property. Resolution of this issues turns on interpretation of MCL 600.2940. This Court reviews questions of statutory interpretation de novo. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004).

"Cities may proceed in the circuit court, under properly enacted ordinances, to abate and remove nuisances. The Legislature has conferred on the circuit courts broad equitable jurisdiction over nuisance-abatement proceedings, irrespective of the nature and extent of the particular alleged nuisance. MCL 600.2940(1)." *Ypsilanti Fire Marshal v Kircher*, ___ Mich App ___, ___ n 10; ___ NW2d ___ (2006) (internal citation omitted). Under MCL 600.2940(3), if the circuit court enters a judgment ordering the nuisance to be abated, "the court may issue a warrant to the proper officer, requiring him to abate and remove the nuisance at the expense of the defendant . . . ." The expenses incurred by abatement are to be collected "in the same manner as damages and costs are collected upon execution . . . in like manner as goods are sold on execution for the payment of debts." MCL 600.2940(4); see also *Cheybogan Co Constr Code Dep't v Burke*, 148 Mich App 56, 59; 384 NW2d 77 (1985). Likewise, "equity may deal with property used in maintaining a nuisance in any way reasonably necessary to suppress the nuisance. Thus, a court of equity may direct that a structure which constitutes a nuisance be abated unless such changes as will obviate the objection are made within a specified time." 58 Am Jur 2d, Nuisances, § 346, p 749.

Here, the circuit court awarded plaintiff damages incurred in abating the nuisance. Plaintiff provided an itemization of the costs incurred in abating the nuisance. Defendant offered no evidence that tended to disprove the costs enumerated by plaintiff. On July 14, 2004, the circuit court entered an order awarding costs consistent with the costs enumerated in plaintiff's motion. Defendant offers no legal or empirical reason why this Court should reverse the circuit court's order. Defendant's argument that the circuit court's order infringed on his right to a trial by jury ignores the fact that, plaintiff never made a proper demand for trial by jury. The trial court did not err in awarding costs to plaintiff under MCL 600.2940.

Defendant next argues that the circuit court erred in holding that "res judicata and doctrines of estoppel" did not bar plaintiff's complaint. Defendant filed a "motion to dismiss" based on "res judicata and doctrines of estoppel," which the parties and circuit court seemingly treated as a motion for summary disposition brought under MCR 2.116(C)(7) and MCR 2.116(C)(10). This Court reviews a trial court's order on a motion for summary disposition de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). Summary disposition is proper under MCR 2.116(C)(7) if "[t]he claim is barred because of . . . prior judgment . . . ." MCR 2.116(C)(7). MCR 2.116(C)(7) provides the proper basis for granting summary disposition pursuant to the doctrine of collateral estoppel. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). A motion brought pursuant to MCR 2.116(C)(7), similar to a motion brought under MCR 2.116(C)(10), requires consideration

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2.508(B). Defendant requested a jury trial on his counter-complaint against plaintiff on the face of his pleadings but the record displays that defendant's request was not accompanied by the requisite jury fee as required by MCR 2.508(B)(1). As such, trial by jury is waived pursuant to MCR 2.508(D)(1).

of all documentary evidence presented by the parties. *Herman v City of Detroit*, 261 Mich App 141, 143; 680 NW2d 485 (2004). Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and documentary evidence presented, viewed in the light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Furthermore, whether res judicata bars a claim is a question of law that this Court reviews de novo. *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492, 510; 679 NW2d 106 (2004).

The doctrine of res judicata bars a subsequent action between the same parties when the facts or evidence essential to the action are identical to those essential to a prior action. *Chestonia Twp v Star Twp*, 266 Mich App 423, 429; 702 NW2d 631 (2005). Res judicata will apply only if: (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first; and (4) both actions involved the same parties or their privies. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 10; 672 NW2d 351 (2003). Michigan courts have broadly defined res judicata "to bar litigation in the second action not only of those claims actually litigated in the first action, but also claims arising out of the same transaction that the parties, exercising reasonable diligence, could have litigated but did not." *Id.* at 11.

Collateral estoppel precludes relitigation of issues between the same parties. *VanVourous v Burmeister*, 262 Mich App 467, 479-480; 687 NW2d 134 (2004), citing *Jones v Chambers*, 353 Mich 674, 680-681; 91 NW2d 889 (1958). In *Monat v State Farm Ins Co*, 469 Mich 679, 682-685; 677 NW2d 843 (2004), the Michigan Supreme Court stated that a party seeking application of this doctrine must establish that: (1) a question of fact was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there is mutuality of estoppel, i.e., the party seeking to take advantage of the prior adjudication would have been bound by it if it had resulted in an adverse disposition.

An essential element of res judicata is that "the decree in the prior action was a final decision." *Peterson Novelties, supra* at 10. Similarly, collateral estoppel requires a "valid and final judgment." *Monat, supra* at 682-685. Here, defendant failed to show that the district court had previously ordered that the nuisance be abated. Although the district court had previously entered an order on October 3, 2003, requiring the nuisance to be abated, plaintiff provided the district court's register of actions indicating that that order had been set aside. The record is devoid of any evidence that the district court entered a "final decision" or "final judgment" regarding the nuisance. Based on this record, defendant failed to show that he was entitled to judgment as a matter of law based on prior judgment under MCR 2.116(C)(7) and the circuit court correctly denied defendant's motion for summary disposition under MCR 2.116(C)(7).

Finally, defendant states in his "questions presented" that the circuit court erred by dismissing his counterclaim. Defendant, however, devotes no portion of his brief on appeal to this issue. An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims; nor may he give issues cursory treatment with little or no citation of supporting authority. *Peterson Novelties, supra* at 14. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the

issue on appeal. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). This issue is abandoned.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Brian K. Zahra